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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 449

JAMES JUDE TAGLIA,
PETITIONER,

V.

MELVIN R. LAIRD,
SECRETARY OF DEFENSE
RESPONDENT.

PETITION FOR REHEARING OF ORDER
DENYING PETITION FOR WRIT OF CERTIORARI

ROBERT SHERIFFS MOSS

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ATTORNEY FOR PETITIONER

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Your Petitioner, James Jude Taglia, respectfully prays that the Court reconsider its order denying his Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, in the above entitle cause, entered by this Court on October 12, 1970, and grant the Petition.

As grounds for this Petition, Petitioner respectfully requests the Court's consideration

of the following:

1. The Petition for a Writ of Certiorari was centered primarily on an alleged violation of the ruling of this Court in the case of Greene v. McElroy, 360 U.S. 474 (1957), and essentially invited this Court's attention to the fact that the administrative proceeding conducted by the Department of Defense, wherein Petitioner's security clearance was revoked, thereby depriving him of employment at his chosen occupation, was conducted under regulations which failed to assure to Petitioner the requisite fundamental elements of due process of law. The factual basis for Petitioner's allegation in the Petition of error in the administrative proceedings consists of the denial of a full opportunity to cross-examine witnesses due to the refusal of the witnesses to answer questions propounded by the attorney for Petitioner on cross-examination. The decision of the United States District Court for the District of Columbia which upheld the administrative decision to revoke the security clearance posed three grounds for its action. (Pet. App. B.1). The District Court decision was affirmed per curiam by the United States Court of Appeals primarily on the basis that it was in "general agreement" with the reasoning of the District Court. (Pet. App. A.1).

2. Since the Petition and record filed herein clearly establish the denial of due process, it is considered that this Court must have concluded that the Petitioner's due process rights had either

the testimony of recalcitrant witnesses, or that the decision of the District Court that, even if the testimony of the recalcitrant witnesses was not considered, the decision of the Respondent revoking Petitioner's industrial security clearance was supported by substantial evidence was correct. In either case Petitioner urges this Court, for the reasons hereinafter set forth and not fully presented in the Petition to review the decision below, to grant Certiorari in this case to consider whether or not an administrative decision may be considered as being supported by substantial evidence where the record discloses that the principal witnesses, as was the case here, refused to answer question on cross-examination and Petitioner was unable to subpoena the witnesses for the purpose of eliciting material testimony.

The administrative proceeding which was conducted by the Department of Defense under DOD Directive 5220.6, 25 F.R. 14392, as amended, 31 F.R. 16188 (Pet. 7-14), allowing introduction of testimony adverse to Petitioner without providing the assurance of cross-examination was unauthorized by Executive Order No. 10865 which established the industrial personnel security clearance program. The failure of the regulation to insure the right of cross-examination makes the Regulation and the proceeding had thereunder fatally defective under Greene v. McElroy, 360 U.S. 474 (1957), because neither Congress nor the President by Executive Order No. 10865 authorized

withholding or curtailment of this right guaranteed by the Constitution of the United States as essential to due process of law.

The conclusion of the United States District Court that "the administrative procedures provided a full and fair hearing with ample opportunity to cross-examine witnesses as required by Greene v. McElroy, 360 U.S. 474 (1957)..." is erroneous as a matter of law. The Department of Defense Regulations, supra, which governed the proceedings did not provide any method for compelling answers on cross-examination. Witnesses for the Government testified freely on direct examination but refused to answer pertinent and essential questions propounded by the Attorney for Petitioner on cross-examination. Since there was no method for compelling the witnesses to answer, the testimony presented on direct examination could not be properly tested through cross-examination, and relevant evidence was excluded from disclosure at the will of the witnesses. This Court has quite clearly held that where the presiding officer in an administrative proceeding improperly curtails cross-examination there is a denial of a fair hearing.1/ If improper curtailment of cross-examination by the presiding officer results in a denial of a fair hearing it is inconceivable that a proceeding wherein witnesses themselves can and do refuse to answer material questions on cross-examination is "a fair and full hearing with ample opportunity to cross-examine witnesses".

The alternate holding of the United States District Court that "although the hearing officer may have been unable to compel testimony on cross-examination as to certain questions, plaintiffs could have protected their rights by a motion to strike but elected not to do so" is also erroneous. One of the essential characteristics of an administrative proceeding is the absence of technical, procedural rules which in the context of the proceedings serve no useful purpose. Davis, Administrative Law Treatise, 1958, Vol. 2, §1403. Professor Davis says (at §1403):

> "To the extent that the exclusionary rules of evidence are the peculiar product of the jury system, they should be deemed inapplicable to cases tried without juries, both in the judicial process and in the administrative process. Except for the rules of privilege, the exclusionary rules are rather clearly based upon the needs, real or supposed, of protecting untrained jurors from relevant but possibly misleading evidence."

Professor Davis in support of this statement cites Wigmore, Administrative Boards and Commissions: Are the Jury-Trial Rules of Evidence in Force for Their Inquiries?, 17 Ill. L.Rev. 263 (1922) as follows:

> "Historically, the rules of evidence familiar to Anglo-American lawyers were a

> direct growth out of trial by jury... Presumably, therefore, the rules are inapt for a permanent officer or board sitting without a jury and skilled by long habit in the investigation of a special kind of controversy."

While there is a rational and substantial basis in a trial to a jury for requiring a motion to strike objectionable evidence, thus allowing the Court to give exclusionary and cautionary instruction to the jury, in administrative proceedings the rule is without any underlying rationale. The testimony and other evidence in an administrative proceeding is heard and considered by a quasi-judicial hearing examiner. Once testimony is given in such a proceeding and objection is taken, a technical motion to strike is a useless gesture.

In this connection it may be observed that there is a substantial body of case law which holds that hearsay and other "incompetent" evidence may be received in evidence and may support an agency's findings. See Davis, Administrative Law Treatise, Vol. 2, §1409. As was stated by Judge Learned Hand in G. & C. Merriam Co. v. Syndicate Publishing Co., 208 F. 515, 518 (2d Cir. 1913), where the only evidence either way on a fact in issue was hearsay: "If this be not evidence I can see no way of getting any better, and the fact cannot be established at all. Surely the law is not so unreasonable as that". Therefore, in an administrative proceeding it is

perhaps necessary that evidence which is objectionable on occasion be admitted in evidence and the hearing examiner be allowed to determine its probative value.

However, the testimony of a witness given on direct examination which is not subject to the test of cross-examination because the witness refuses to answer questions on cross-examination can have no probative value whatsoever. Where the hearing examiner is fully apprised of the objections thereto, a motion to strike serves no useful purpose. When the hearing examiner is apprised of the fact that the testimony is objectionable and of the nature of the objection he is in the same position as though a technical motion to strike had been made. He must then, in making his findings of fact and reaching a decision in the case, take cognizance of the objectionable nature of the testimony, and if, when related to other evidence presented, it fails to have probative value, it should be disregarded.

Additionally, where cross-examination is denied and the hearing examiner is without power to subpoena witnesses a motion to strike does not suffice to produce a fair hearing. Not only does objection lie as to the probative value of testimony presented on direct examination, but more importantly there is necessarily involved an inability to elicit evidence which is material and pertinent to the inquiry. The notion that a failure to move to strike testimony presented on direct examination cures the defect existing when cross-examination is withheld may have validity where the witness may be supponed by the

aggrieved party and required to testify. However, when the subpoena power is unavailable, the defending party has no method for obtaining the material information which the witness refuses to disclose, and a different problem is presented.

In the instant case Petitioner's attorney continuously objected to the entire proceeding for failure to assure cross-examination, thus clearly placing the hearing examiner on notice that testimony introduced on direct-examination where witnesses refused to answer questions on cross-examination was objectionable. Petitioner's attorney was unable to elicit material information which the witnesses possessed due to their refusal to answer questions on cross-examination and to the absence of the power of subpoena whereby the witness could be called by Petitioner and be required to answer.

Thus, a technical motion to strike was inappropriate in the administrative proceeding here involved; but even if it had been made it would not have cured the defect arising from Petitioner's inability to elicit material and relevant testimony from the witness who refused to answer questions on cross-examination. The District Court's reliance on Petitioner's failure to make a technical motion to strike, expecially where the reliance resulted in the acceptance of findings based on testimony not tested by the constitutionally protected right of cross-examination was clearly erroneous. It is difficult to understand how this Court could stand aside and permit so flagrant an abuse of due process.

The objections of Counsel for Petitioner were sufficient to raise and preserve Petitioner's claim of error, involving both the testimony presented on direct examination and the inability to elicit relevant information. The inability and refusal of the administrative tribunal to assure cross-examination makes the proceeding constitutionally defective and a technical motion to strike would not have remedied the defect.

The alternate holding of the District Court that "the findings are supported by ample evidence even if the testimony of the witnesses who were not compelled to answer on cross-examination is excluded..." is without support in the record and is clearly erroneous. The witnesses who refused to answer questions on cross-examination were key government witnesses. If the testimony given on direct examination by these witnesses is disregarded the record fails to establish a prima facie case of violation of the industrial security regulations. In particular, the testimony of witness Poole and witness Byrnes were essential to establishment that the documents alleged to have been compromised by the Petitioner were in fact classified. In addition to this aspect of the factual basis for the administrative decision, there remains a fatal defect in that, due to the denial of cross-examination, the District Court was necessarily speculating on what the record would have established had these witnesses fully answered all questions on cross-examination. In view of the denial of Petitioner's right under Green v. McElroy, supra, to be afforded cross-examination of adverse witnesses, unless Congress or the

President provides for curtailment of this right (which neither has done) 2/, any decision by the District Court which is based on what the record in its present form establishes is arbitrary and capricious. Petitioner was in fact denied the right of cross-examination, and it is inherently impossible for the District Court, on the present record, to determine what additional facts would have been established had Petitioner's cross-examination of government witnesses not been willfully and unconstitutionally curtailed.

Petitioner respectfully asks that this court reconsider its order denying the Petition for Writ of Certiorari and grant the requested Writ of Certiorari in order that the question of whether or not a decision of an administrative agency can be considered to be supported by substantial evidence in such cases where key witnesses refuse to answer questions on cross-examination, thus denying to the court judicially reviewing the decision a complete and full record. The alternative is to permit the reviewing court to speculate as to the record.

2/ That Congress has regarded the right of cross-examination to be essential in administrative proceedings is evidenced by Congressional documents pertaining to the Administrative Procedure Act: "To the extent that

CONCLUSION

For the reasons set forth in this Petition for Rehearing, as well as in the Petition for Certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in paragraph 2 of Rule 58.

ROBERT SHERIFFS MOSS